National Labor Relations Board Weekly Summary of

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Boehringer Ingelheim Vetmedica, Inc. (17-CA-22964; 350 NLRB No. 60) St. Joseph, MO Aug 13, 2007. The Board, in a 2-1 decision, found that the Respondent lawfully locked out employees and presented them with individual no-strike forms that they would have to sign before being permitted to return to work. The Board reversed a 2005 decision of an administrative law judge that found that, although the lockout was initially lawful, the Respondent's presentation of no-strike forms to individual employees constituted direct dealing and, from that time forward, the lockout violated Section 8(a)(1), (3), and (5) of the Act. The Board found that the Respondent timely informed the Union of its intentions, giving it the option of ending the lockout by providing assurances that there would not be a strike, either by providing such assurance on behalf of bargaining unit employees or by providing no-strike assurances from individual employees. Dissenting, Member Walsh found that the Respondent violated the Act by dealing directly with locked-out bargaining unit employees. He found that the Respondent bypassed the Union by failing to inform it specifically of the Respondent's intent to present the no-strike forms to individual employees. [HTML] [PDF]

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Food and Commercial Workers District Local Two; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Overland Park, Kansas, Aug. 16 and 17, 2005. Adm. Law Judge Gregory Z. Meyerson issued his decision Oct. 21, 2005.

The Carney Hospital (1-CA-38280; 350 NLRB No. 56) Boston, MA Aug. 13, 2007. This case sets forth new guidelines in applying the test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), for determining whether unfair labor practice allegations that are otherwise time-barred by the 6-month limitations period in Section 10(b) may be litigated. The Board in *Redd-I* held that otherwise untimely allegations may be litigated if they were "closely related" to allegations in a prior timely filed charge, and set forth the following test for making that determination: (1), the otherwise untimely allegations must involve the same legal theory as the allegations in timely charge; (2), the otherwise untimely allegations must arise from the same factual situation or sequence of events as the allegations in timely charge; and (3) the defenses raised to both the untimely and timely charged allegations may, but need not be, the same or similar. (The third part of this test is not a mandatory aspect of the *Redd-I* test). [HTML] [PDF]

The Board's focus in *Carney Hospital* centered on whether the second prong of the *Redd-I* test was met. The judge, relying on the Board's decision in *Ross Stores, Inc.*, 329 NLRB 573 (1999), found that this prong was met because the conduct alleged in the timely and otherwise untimely charges all arose out of an antiunion campaign carried on by the Respondent. The Board agreed, but the D.C. Circuit disagreed, stating that the "Board's contention that the factual relationship prong can be satisfied *solely* on the basis that the separate acts arise out of the same anti-union campaign here is a deviation from the very precedent it cites." *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 673 (2001).

In response to this judicial criticism, the Board in *Carney Hospital* overruled its decision in *Ross Stores* and stated that it would no longer "find that the second prong [of the *Redd-I* test] is satisfied merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign." 350 NLRB No. 56, slip op. at 4. The following new test was set forth: "where the two sets of allegations 'demonstrate similar conduct, usually during the same time period with a similar object,' or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied." Id. (citations omitted).

(Chairman Battista and Members Schaumber and Walsh participated)

Charges filed by Service Employees Local 285; complaint alleged violations of Section 8(a)(3) and (1). Hearing at Boston, Sept. 22-23, 2003. Adm. Law Judge Paul Bogas issued his decision Jan. 21, 2004.

Champion Enterprises, Inc., d/b/a Champion Home Builders Co. (32-CA-19152-1, et al.; 350 NLRB No. 62) Lindsay, CA Aug. 16, 2007. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by confiscating union materials from employees and telling employees that the Union's picketing of its dealer would force the Respondent out of business. The Board further adopted the judge's finding, but a majority applied a different rationale, that the Respondent violated Section 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain regarding the announcement of the shutdown of the plant, layoff of employees, selection of employees for work during the shutdown, and performance of bargaining unit work by supervisors. A Board majority adopted the judge's finding that the Respondent violated Section 8(a)(5) by failing to provide the Union with information requested on February 11, 2002. Member Schaumber dissented on this issue. [HTML] [PDF]

The Board majority reversed the judge's finding that the Respondent violated Section 8(a)(1) by soliciting employees to report to management the names of union supporters who "interfer[ed]" with their work or "threaten[ed]" them with job loss or other unspecified harm. The Board majority reasoned that the judge took the Respondent's speech out of context. It concluded that the Respondent did not solicit reports of employees' protected Section 7 activities, but only sought information regarding instances in which union solicitors interfered with plant production or made unprotected threats of harm and job loss. Member Walsh dissenting, explained that the Respondent's speech, viewed in its total context, contained an unlawful invitation to report protected activity to management.

The majority also reversed the judge's finding that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on April 18, 2002. The majority explained that applying the factors set forth in *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the unlawful conduct at issue was insufficient to taint the employees' petition indicating that they no

longer desired union representation. Member Walsh dissenting, found that the majority failed to properly apply the relevant factors under *Master Slack*, and would find that the employee petition was tainted and, consequently, that the Respondent's April 18 withdrawal of recognition was unlawful.

The Board majority, having reversed the judge's finding regarding the unlawful withdrawal of recognition, reversed the judge's findings that the Respondent violated Section 8(a)(5) by granting a unitwide wage increase on the day after its withdrawal of recognition and failing to provide information requested on February 14, April 22 and May 15, 2002. It also reversed the judge's recommended remedy to include an affirmative bargaining order.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Carpenters Local 1109; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Visalia, Aug. 27-30, 2002. Adm. Law Judge Mary Miller Cracraft issued her decision Jan. 17, 2003.

Datwyler Rubber and Plastics, Inc. (11-CA-21185; 350 NLRB No. 58) Marion, SC Aug. 13, 2007. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening its employees with plant closure if a union were brought in, and by threatening its employees with termination for making statements at group meetings concerning terms and conditions of employment. The Board also affirmed the judge's finding that the Respondent violated Section 8(a)(1) for discharging employee Mononga Moore for engaging in protected concerted activities. Applying the factors set forth in Atlantic Steel Company, 245 NLRB 814 (1979), the panel majority found that all four factors weighed in favor of Moore not losing the protection of the Act. [HTML] [PDF]

In a personal footnote, the Chairman found that assuming arguendo the *Atlantic Steel* factor of nature of the outburst weighs against protection, it is outweighed by the other three *Atlantic Steel* factors.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Mononga Moore, an individual; complaint alleged violations of Section 8(a)(1). Hearing at Florence, Nov. 6-7, 2006. Adm. Law Judge Lawrence W. Cullen issued his decision March 2, 2007.

First Transit, Inc. (21-CA-32146, et al.; 350 NLRB No. 68) Pomona, CA Aug. 17, 2007. The Board, in this supplemental backpay decision, ordered that the Respondent pay 30 claimants amounts totaling \$925,687.99. In doing so, a shifting majority of the Board overruled the administrative law judge's backpay determination as to four claimants: Frances Carmona, Juanita Madden, Cindy O'Neal, and Joyce Robinson. [HTML] [PDF]

The Board found in 2000 that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its attendance policy. *Ryder/Ate, Inc.*, 331 NLRB 889 (2000), enfd. 22 Fed.Appx. 3 (D.C. Cir. 2001). The Board ordered the Respondent to reinstate and make whole any employee who had been discharged, suspended or disciplined as a result of the unlawfully implemented policy. Subsequently, the Regional Director identified 37 employees whose employment was allegedly lost pursuant to the policy. An administrative law judge ordered backpay awards for 28 claimants in amounts totaling \$840,347.82. The Respondent and the General Counsel filed exceptions to the judge's decision.

As to claimant Frances Carmona, Chairman Battista and Member Kirsanow overturned the judge and reduced her backpay award, finding that she unreasonably quit interim employment. They found that the General Counsel failed to meet his burden of proving that Carmona's decision to quit was reasonable. Member Liebman, dissenting, would have adopted the judge's decision and awarded Carmona the backpay award set out in the specification, arguing that the Respondent did not meet its initial burden of proving Carmona's interim employment was substantially equivalent to her employment with the Respondent.

As to claimant Juanita Madden, Chairman Battista and Member Kirsanow reversed the judge and found that Madden was not entitled to backpay. They found that the General Counsel did not meet his burden of showing that Madden was discharged pursuant to the Respondent's unlawfully implemented policy. In doing so, they relied on Madden's testimony that she resigned from employment rather than the Respondent's personnel records, which indicated that Madden had been terminated. Member Liebman, dissenting, would have adopted the judge's decision, relying on the Respondent's personnel records rather than Madden's testimony.

As to claimant Cindy O'Neal, Chairman Battista and Member Liebman reversed the judge and found that O'Neal lost her employment pursuant to the Respondent's unlawfully implemented attendance policy. O'Neal was scheduled for imminent termination under the Respondent's policy, but was given the option to resign by the Respondent. Rejecting the judge's reliance on a constructive discharge theory, Chairman Battista and Member Liebman found that O'Neal lost her employment as a result of the Respondent's policy and was thus entitled to backpay. Member Kirsanow, dissenting, would have denied O'Neal backpay based on her testimony that she "intended on quitting" the job even if she had not violated the Respondent's policy.

As to claimant Joyce Robinson, Chairman Battista and Member Liebman reversed the judge and found that Robinson was entitled to the full backpay award set forth in the specification. During the backpay hearing, Robinson came forward with testimony that she had

been convicted of second degree robbery prior to her employment with the Respondent. Robinson also testified, erroneously, that she had disclosed this felony on her initial employment application with the Respondent. Chairman Battista and Member Liebman, applying the Board's holding in *John Cuneo*, *Inc.*, 298 NLRB 856 (1990), held that Robinson was entitled to backpay because the Respondent did not become aware of her misconduct until after her backpay period had ended. Member Kirsanow, dissenting, would have denied Robinson backpay completely, rejecting the majority's "broad characterization" of *John Cueno*. "Weighing the equities" of this case, Member Kirsanow would have found that Robinson was not entitled to backpay.

The Board also rejected Respondent's exception to the judge's denial of its motion to reopen the record to admit employee personnel records into evidence for all of the claimants. In addition, the Board rejected the Respondent's request for an oral argument.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Hearing at Los Angeles 8 days between Nov. 1 and 18, 2004. Adm. Law Judge James M. Kennedy issued his supplemental decision July 29, 2005.

Fluor Daniel, Inc. (26-CA-13842; 350 NLRB No. 66) Greenville, SC Aug. 13, 2007. This case was on remand to the Board from the United States Court of Appeals for the Sixth Circuit. In its initial decision, 311 NLRB 498 (1993), the Board had held that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire 53 voluntary union organizers, or "salts." The Board had petitioned the Sixth Circuit for enforcement of its decision, but the Sixth Circuit declined (161 F.3d 953 (6th Cir. 1998)), finding that the Board had failed to address whether the General Counsel had sufficiently matched each of the salts with a vacant position for which the salt was qualified. [HTML] [PDF]

Applying the court's decision as the law of the case, the Board remanded the case to the administrative law judge, who found that the General Counsel had met his burden of matching the salts with available positions for which they were qualified.

On exceptions, the Board dismissed the complaint as to two salts, Richard Bowlds and George Saltsman. With respect to Bowlds, a majority of the panel (Members Schaumber and Kirsanow) found that Bowlds' application did not sufficiently indicate his status as a union salt. In this regard, while the application listed the business agent and assistant business agent of Iron Workers Local 103 as his references and had been submitted along with applications from other salts, the applications had been submitted to a job service that lumped hundreds of applications together and gave them to the Respondent. Thus, under the circumstances, there was an insufficient basis to find that the Respondent would have known that Bowlds was a salt. Member Liebman disagreed on this point, finding that Bowlds' listed references and the fact that the salting operation was undertaken by Bowlds' union (among others) were sufficient grounds

to find that the Respondent would have considered Bowlds a salt. With respect to Saltsman, the Board found that the Respondent's failure to hire him was based on the fact that he submitted an incomplete application, not because of anti-union animus.

With regard to the remaining salts, the Board found that, in assessing whether there were available jobs for them, it would not consider jobs for which offers already had been extended, or jobs that already had been vacated, before the salts applied. Instead, the Board considered only jobs that were filled after the salts applied. The Board found that, for several salts, the General Counsel matched them up with positions that were not truly available at the time they applied, and thus that the General Counsel failed to prove that they were discriminated against in the hiring that occurred in the spring of 1990. However, the Board found that the General Counsel sufficiently matched those salts up with available jobs in the fall of 1990, and thus dismissal of the complaint as to those salts was not warranted.

With regard to whether the salts were qualified for the available positions, the Board found that, in assessing qualifications, the judge properly relied on the experience and education listed on the salts' job applications, and correctly found that the salts were more qualified than the individuals who were hired over them. In addition, the Board rejected the Respondent's affirmative defenses that its hiring decisions were justified by: (1) the alleged "staleness" of the salts' applications, which were filed in the spring of 1990, when it hired for the fall; (2) the Respondent's preference for hiring former employees; (3) the Respondent's alleged preference for hiring people who applied for jobs at the gates of its construction projects; (4) the Respondent's claimed preference for hiring applicants with connections to incumbent employees; and (5) the fact that there was picketing in the spring, which the Respondent argued made it believe that the salts would not be willing to come to work.

(Members Liebman, Schaumber, and Kirsanow participated)

J & R Roofing Company, Inc. (5-CA-30913; 350 NLRB No. 61) Jessup, MD Aug. 13, 2007. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by telling job applicants that it did not, and would not, hire any person affiliated with the Union; threatening to throw away the application of any individual affiliated with the Union or other labor organization; throwing into a trash can applications completed by applicants for employment who were affiliated with the Union; and interrogating applicants through its employment application forms about their union membership, activities and sympathies. [HTML] [PDF]

The Board reversed the judge's finding that the Respondent violated Section 8(a)(3) by failing to hire eight union-affiliated applicants. The Board found that the Respondent met its rebuttal burden of showing that it would not have hired the applicants regardless of their union activities, because of lewd and sexually offensive comments directed to the Respondent's

manager and the sister of the Respondent's president. The Board found that the conduct of the applicants was wholly separate from any antiunion animus on the part of the Respondent and a legitimate basis for not hiring them.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Roofers, Waterproofers & Allied Workers Local 30; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Baltimore, Sept. 9-10, and Dec. 9, 2002. Adm. Law Judge John T. Clark issued his decision Feb. 11, 2004.

Mid-Mountain Foods, Inc. (11-CA-17684; 350 NLRB No. 67) Abingdon, VA Aug. 13, 2007. The Board reversed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (4) of the Act by discharging employee Brian Blevins. The Board found that the judge improperly heightened the applicable burden of proof under Wright Line by describing the Respondent's burden as one of establishing that Blevins' discharge was "inevitable or almost inevitable under the circumstances." Applying the appropriate Wright Line standard, the Board found that the Respondent met its rebuttal burden. The Board found that the discipline imposed on Blevins was consistent with the Respondent's disciplinary policy, and there were no identifiable instances in which the Respondent disparately applied this policy. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Food and Commercial Workers Local 400; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Abingdon, April 16-17, 2001. Adm. Law Judge Keltner W. Locke issued his decision May 22, 2001.

Norton Health Care Inc. d/b/a Norton Audubon Hospital and Norton Suburban Hospital, successor to Audubon Regional Medical Center (9-CA-31725, et al.; 350 NLRB No. 57)

Louisville, KY Aug. 13, 2007. In this compliance proceeding, the Board adopted the administrative law judge's finding that the Respondent made invalid offers of reinstatement to its former employee RN Joanne Sandusky and promotion to RNs Patricia Clark and Martha Ann Hurst, and adopted the judge's findings that Counsel for the General Counsel correctly calculated the mileage reimbursement rate owed Sandusky in connection with her travel expenses while she worked for her interim employer. The Board also found merit to the Respondent's exception to the judge's extension of its obligation to supply names and addresses of unit employees to the Union. The Board remanded the case to the judge to consider two issues: First, the Board granted the Charging Party's motion to remand and reopen the record to determine whether Sandusky's prior position still exists for reinstatement purposes. Secondly, the Board remanded

the issue of the supervisory status of the Respondent's clinical coordinator position in light of the Board's decisions in *Oakwood Healthcare*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006). [HTML] [PDF]

In its earlier decision, at 337 NLRB 374 (2000), the Board found that in January 1996 the Respondent's predecessor unlawfully denied Clark and Hurst promotions to patient care leader positions (now titled clinical coordinator). The Board ordered the Respondent's predecessor to offer Clark and Hurst those positions, and adopted the judge's finding that the positions were nonsupervisory. In July 2000, the Respondent offered Clark and Hurst the positions on the condition that they accept the positions as supervisory. They declined because they did not want to give up their right to engage in union activity. At the compliance hearing, the judge found the initial offers invalid and ordered the Respondent to reoffer the positions without the improper qualification that the positions were supervisory. Subsequent to the compliance hearing, the Board issued its decisions in Oakwood Healthcare, Croft Metals, and Golden Crest Healthcare, in which it refined its analysis of supervisory status under the Act. In remanding, the Board agreed with the judge that the offers were invalid, but concluded that the current supervisory status is relevant to the Respondent's continuing obligation to reoffer the positions. Specifically, the Board stated that it could not compel the Respondent to designate a supervisory position as nonsupervisory and require the Respondent to fill it with employees who would be free to exercise Section 7 rights under the Act. Thus, if the judge determines that the clinical coordinator positions are now supervisory under the Act, he must determine (a) whether a substantially equivalent position exists for promotion purposes, and (b) the Respondent's backpay obligation.

Dissenting in part, Member Walsh would have denied the Charging Party's motion to remand and reopen the issue of RN Sandusky's position, because it had not shown that its "newly discovered evidence" would require a different result. He also dissented from the decision to remand the supervisory status of the clinical coordinator position, finding that the status is not relevant to the Respondent's obligation to offer the position to Clark and Hurst. The Respondent had not sought reconsideration or review of the prior determination that the position was not supervisory, and that determination should be treated as the law of the case for all aspects of the compliance proceeding.

Also dissenting in part, Member Kirsanow would have extended the Respondent's original 1-year requirement for providing names and addresses of unit employees. He noted, inter alia, that the original election in this case occurred in 1994, that the Board ordered the second election in 2000, that the second election still has not been held due to additional unremedied unfair labor practices, and that the 2nd election may be years away. It would thus effectuate the purposes of the Act to extend the names-and-addresses remedy.

(Members Schaumber, Kirsanow, and Walsh participated.)

Hearing at Louisville, October 21, 22, and 23, 2002. Adm. Law Judge Ira Sandron issued his supplemental decision March 14, 2003.

Provena Hospitals d/b/a Provena St. Joseph Medical Center (13-CA-39122-1; 350 NLRB No. 64) Frankfort, IL Aug. 16, 2007. A Board panel majority of Members Liebman and Walsh affirmed the administrative law judge's application of the "clear and unmistakable waiver" standard for determining whether an employer has fulfilled its statutory bargaining obligation and found that the Respondent, Provena St. Joseph Medical Center, violated Section 8(a)(5) of the Act by unilaterally and without notice to the Union (Illinois Nurses Association) implementing a staff incentive policy, but reversed the judge and dismissed another 8(a)(5) allegation with respect to the Respondent's unilaterally implementing a new attendance and tardiness policy. [HTML] [PDF]

Admitting that it acted unilaterally with respect to both matters, the Respondent asserted that it was privileged to do so because the Union had waived its right to bargain about these matters and, alternatively, that the "contract coverage" standard should be followed rather than the "clear and unmistakable waiver" standard applied by the judge.

In explaining its reasons for adhering to the waiver standard, the majority acknowledged that "contract coverage" has been endorsed by the Seventh and DC Circuits, and specifically addressed those courts' concerns. The majority pointed to the approval by many courts, including the Supreme Court, of the Board's long-established waiver analysis, the Board's unique responsibility of ensuring that the mandates of the Act are carried out, and the likelihood of complicating the collective-bargaining process by switching to a different analytical approach.

Applying the Board's traditional "clear and unmistakable waiver" test, the majority determined that because (1) the parties collective-bargaining agreement did not contain an express provision regarding incentive pay, and (2) there was no evidence that during the course of negotiations, the subject of incentive pay was consciously explored or that the Union intentionally relinquished its right to bargain over the topic, the Respondent was not privileged to act unilaterally on the matter. With respect to the attendance and tardiness policy, however, the majority determined that several parts of the contract's management rights clause, read together, explicitly authorized the Respondent to take unilateral action.

In dissent, Chairman Battista embraced contract coverage, stating that it would eliminate the conflict between the Board and certain courts as well as harmonize the Board's views with the grievance-arbitration process. He stated that under contract coverage, where there is a clause relevant to the dispute within the collective-bargaining agreement, it can reasonably be said that the parties have bargained about the subject, not that there has been a refusal to bargain. Applied to the instant case, he determined that the Respondent acted lawfully in both matters because (1) the management rights clause contained several provisions relevant to time and attendance and (2) a provision relating to "extraordinary pay" as well as language in the management rights section arguably permitted the Respondent to act unilaterally with respect to incentive pay.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Illinois Nurses Association; complaint alleged violations of Section 8(a)(5) and (1). Hearing at Chicago on Oct. 16, 2001. Adm. Law Judge Bruce D. Rosenstein issued his decision Dec. 21, 2001.

SKC Electric, Inc. (17-CA-19438, et al.; 350 NLRB No. 70) Lenexa, KS and Columbia, MO Aug. 17, 2007. The Board reversed the findings of the administrative law judge that (1) certain untimely 8(a)(1) complaint allegations were "closely related" to a timely filed 8(a)(3) charge; and (2) the Respondent unlawfully refused to hire union applicants Jim Beem, Roger Lake, Matt Mapes, Chris Heegn, and Gary Fisher. In reversing the judge's finding that the timely and untimely allegations were "closely related," the Board applied Carney Hospital, 350 NLRB No. 56 (2007), in which it overruled Ross Stores, Inc., 329 NLRB 573 (1999), enf. denied 235 F.3d 669 (D.C. Cir. 2001), to the extent that it held that "the requisite factual relationship under the 'closely related' test may be based on acts that arise out of the same antiunion campaign." 329 NLRB at 574. Applying Carney, the Board concluded that Section 10(b) of the Act bars the complaint allegations that the Respondent violated 8(a)(1) by threatening employees with job loss and by telling employees that the Respondent would never sign a contract, but does not bar the allegation that the Respondent violated 8(a)(1) by interrogating employee Kevin O'Brian. [HTML] [PDF]

The Board also adopted, with modified rationale, the judge's finding that the Respondent unlawfully withdrew recognition from IBEW Local 257 after the certification year. In addition, the Board adopted the remaining 8(a)(3) and (1) violations found by the judge (discharging Robert Terhune, denying training to Kevin O'Brian, transferring Eric Yatsook, imposing more onerous working conditions on Rick Brockman; threatening employees with stricter supervision and working conditions, discriminatorily restricting employees from discussing the Union, telling employees it will try to keep them segregated so as to prevent union organizational efforts, coercively interrogating employee Kevin O'Brian, telling employees that the Respondent will avoid hiring union sympathizers, discriminatorily refusing to permit striking employees to attend company meetings, and telling employees they were transferred because they engaged in protected activities.)

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Electrical Workers IBEW Locals 24 and 257; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Overland Park, KS March 23-26, 1999. Adm. Law Judge Albert A. Metz issued his decision Nov. 16, 1999.

Sproule Construction Company (33-CA-12381; 350 NLRB No. 65) Galena, IL Aug. 15, 2007. The Board, affirming the administrative law judge, found that the Respondent violated Section 8(a)(1) of the Act by interrogating two employees and violated Section 8(a)(3) by discharging an employee for distributing authorization cards and by refusing to reinstate three unfair labor

practice strikers. With regard to the interrogation violation, the Board applied the all-the-circumstances standard announced in *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *H.E.R.E, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); Member Walsh applied the inherently-coercive standard. With regard to the refusal-to-reinstate violation, the Board rejected the Respondent's contention that union direction of a strike renders the strike unprotected. [HTML] [PDF]

The Board also found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire nine applicants and by refusing to consider 20 applicants. Relying on the Supreme Court's decision in NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995), the Board rejected the Respondent's contention that those applicants who were full-time paid union officials were not bona fide applicants. In reversing, in part, the administrative law judge's finding of a refusal-tohire violation with regard to all 29 applicants, the Board, applying FES (A Division of Thermo Power), 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002), affirmed the administrative law judge's finding that the General Counsel proved 12 vacancies, allocated 3 of the vacancies to the discharged employee and 2 of the unreinstated strikers, allocated the remaining 9 vacancies to the applicants, found a refusal-to-hire violation with regard to 9 applicants, found a refusal-toconsider violation with regard to the remaining applicants, and struck that portion of the administrative law judge's decision that would have allowed the General Counsel to prove additional pre-unfair-labor-practice-hearing vacancies in compliance. The Board deferred to compliance the determination as to which of the applicants would have been hired for the vacancies and would accordingly be entitled to a make-whole remedy. Noting that all of the discriminatees were salts, the Board modified the make-whole remedial provisions in accordance with the Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (2007).

Chairman Battista and Member Kirsanow, in rejecting the Respondent's contention that the applicants were not bona fide applicants, stated that they were not passing on whether there could be circumstances were an alleged discriminatee was not a bona fide applicant. Member Walsh joined in finding that the General Counsel proved four vacancies for one group of applicants but found that the General Counsel proved 17 vacancies for a second group of applicants.

(Chairman Battista and Members Kirsanow and Walsh participated.)

Charges filed by Operating Engineers Locals 139, 150, and 234; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Peoria, Oct. 6-9, 1998. Adm. Law Judge Arthur J. Amchan issued his decision Dec. 30, 1998 and his supplemental decision Oct. 3, 2000.

Syracuse University (3-CA-23985; 350 NLRB No. 63) Syracuse, NY Aug. 15, 2007. The central issue in this case is whether the Respondent's employee complaint procedure, the Staff Complaint Process (SCP), is a labor organization within the meaning of Section 2(5) of the Act. The Board reversed the administrative law judge and found that the SCP is not a labor

organization. Accordingly, it found that the Respondent did not violate Section 8(a)(2) and (1) of the Act by establishing and maintaining the SCP nor Section 8(a)(1) by interfering with employee rights to refrain from supporting a labor organization. The complaint was dismissed. [HTML] [PDF]

The Board concluded that the SCP is not a labor organization because it does not "deal with" the employer on terms and conditions of employment. Rather, the Board found that the SCP is limited to an adjudicative function, similar to the entities found not to be labor organizations in *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977) and *John Ascuaga's Nugget*, 230 NLRB 275 (1977), enfd. in pertinent part 623 F.2d 571 (9th Cir. 1980), cert denied 451 U.S. 906 (1981).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 317; complaint alleged violation of Section 8(a)(1) and (2). Hearing at Syracuse, June 23-24, 2003. Adm. Law Judge Eric M. Fine issued his decision Oct. 29, 2003.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Handyfat Trading, Inc. (Industrial Workers of the World Industrial Union #460) Brooklyn, NY Aug. 14, 2007. 29-CA-28181; JD(NY)-39-07, Judge Howard Edelman.

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

WC Welding (Iron Workers Local 7) (1-CA-43685; 350 NLRB No. 69) Athol, MA Aug. 15, 2007. [HTML] [PDF]

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Ampersand Publishing, LLC d/b/a Santa Barbara News-Press, Santa Barbara, CA, 31-RC-8602, Aug. 16, 2007 (Chairman Battista and Members Kirsanow and Walsh)

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Gellatly & Criscione Services, Philadelphia, PA, 4-RD-2090, Aug. 15, 2007 (Chairman Battista and Members Kirsanow and Walsh)

Waste Management of Pennsylvania-Hauling Division, Morrisville, PA, 4-RD-2115, Aug. 15, 2007 (Chairman Battista and Members Kirsanow and Walsh)

(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Lechner and Sons, Mt. Prospect, IL, 13-RM-1751, Aug. 13, 2007 (Chairman Battista and Member Kirsanow; Member Walsh dissenting)

Charter School Administration Services, Inc., Southfield, MI, 7-RC-23108, Aug. 15, 2007

(Chairman Battista and Members Kirsanow and Walsh)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Carnegie Mellon University, Pittsburgh, PA, 6-RC-12586, Aug. 15, 2007 (Chairman Battista and Members Kirsanow and Walsh)

Carrier Coach, Inc., Cheektowaga, NY, 3-RC-11763, Aug. 15, 2007 (Chairman Battista and Members Kirsanow and Walsh)

Miscellaneous Decisions and Orders

ORDER [granting Employer's motion to withdraw its request for review and returning case to Regional Director for further appropriate action]

Locating, Inc., Subsidiary of Dycom Industries, Inc., Auburn, WA, 19-RC-14949, Aug. 16, 2007
